No. 86-177

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY R. TANNER AND WILLIAM M. CONOVER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioners' conduct constituted a conspiracy to defraud the United States within the meaning of 18 U.S.C. 371.

2. Whether the district court erred by denying petitioners' post-verdict motions for a new trial based on allegations of juror intoxication.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-22) is reported at 772 F.2d 765.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1985. A petition for rehearing was denied on June 26, 1986 (Pet. App. 1-2). The petition for a writ of certiorari was filed on August 2, 1986, and was granted on November 3, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

18 U.S.C. 371 provides, in pertinent part, as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the

object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Rule 606(b) of the Federal Rules of Evidence provides as follows:

> *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371 (Count One). Petitioner Conover was also convicted on four mail fraud counts, in violation of 18 U.S.C. 1341 (Counts Two through Five). Petitioner Tanner was convicted on three of the four mail fraud counts (Counts Two, Four, and Five).[1] Pet. App. 8. Each petitioner was sentenced to concurrent 18-month terms of imprisonment on each count. Petitioner Tanner was also fined $10,000.

[1] Tanner was acquitted on Count Three (Pet. App. 13 n.2). An earlier trial of both petitioners had resulted in a mistrial when the jury was unable to reach a verdict (*id.* at 8).

1. Seminole Electric Cooperative, Inc., is a Florida corporation owned by several rural electric cooperatives located in central Florida. Pet. App. 3. During the period at issue in this case, Conover was the manager of Seminole's Procurement Department. In 1979, Seminole borrowed approximately $1.1 billion from the Federal Financing Bank, an agency of the United States Department of the Treasury, in order to build a coal-fired power plant near Palatka, Florida. The loan was guaranteed by the Rural Electrification Administration (REA), an agency of the United States Department of Agriculture, *Id.* at 3-4. Once the REA guaranteed the loan, it acquired all the rights of the noteholder, the Federal Financing Bank, and the REA dealt with Seminole as an agent of the Bank (J.A. 21; 2 Tr. 64; GX 1-H at 1-2).[2]

Construction of the plant began in September 1979. The construction plan called for a transmission line to be built from the plant to a substation located outside Ocala, Florida. To provide access to the area where the transmission line would run, it was necessary to build a 51-mile patrol road. In order to accommodate the construction work, the road had to be made of materials that would support heavy trucks and resist flooding. Pet. App. 4.

On March 24, 1981, Seminole's supervisor of transmission engineering instructed Conover to locate sources of fill material for the patrol road, because Seminole's existing construction contractor was encountering difficulties obtaining sufficient amounts of

[2] The transcript of the trial ("Tr.") is cited by the volume number, where applicable. The testimony of some witnesses was separately transcribed, and those transcript volumes are cited by the name of the witness and the date of the testimony.

suitable fill. After the meeting, Conover telephoned Tanner, who owned a limerock mine, and the two discussed the possibility of using limerock and limerock overburden as an alternative fill material. Pet. App. 4-5.

Conover and Tanner knew each other from prior business dealings. In July 1980, Conover had agreed to buy a condominium from a company owned by Tanner. In January 1981, Conover had contracted to perform landscaping work and to install a sprinkler system at Tanner's condominium complex for approximately $13,750. On March 9, 1981, Tanner had paid Conover $10,035; the money was allegedly a partial payment on the landscaping contract, although a notation on the check described the payment as a "real estate co-broker commission." Pet. App. 5-6; 6 Tr. 74; 16 Tr. 140-141.

At Conover's request, a Seminole engineer examined the fill material available at Tanner's limerock mine and advised Seminole that the material would be adequate for the project. Pet. App. 5. Conover did not investigate any other source of alternative fill materials. *Ibid.* Seminole subsequently issued a purchase order to Tanner's company, Citrus Sand and Clay, Inc., for enough limerock overburden to maintain the construction. *Ibid.*; 3 Tr. 84. When the material first arrived on March 30, 1981, the Seminole engineer who had previously examined the material noticed that it contained considerably more sand than the material Tanner had exhibited at the mine site. 2/17 Pronia Tr. 18; 8 Tr. 89.[8]

[8] Conover prepared two memoranda to support the purchase order to Tanner's Citrus Sand and Clay Co. In an April 8, 1981, memorandum, Conover stated that consulting engineers and Seminole's engineers had examined and approved the delivered material, although neither had done so (2/16 Sherrill Tr. 32; GX 2-D). Nor, contrary to Conover's representations, had the material been tested (*ibid.*). Conover also represented that a certain engineer had recommended that Tanner's limerock mine had suitable material for road construction, although the engineer had not done so. In his memorandum of April 27, 1981, Conover falsely stated that the handbook of the Florida Department of Transportation recommended that a mixture of limestone be used for roadways (5 Tr. 169-170, 171, 174; GX 2-E), and he also falsely stated that an engineer had advised him that Tanner's limestone mine was the closest mine that could provide a limestone mixture (4 Tr. 111-112; GX 2-E).

Seminole subsequently commenced the process of soliciting bids for the construction of the patrol road. Seminole decided to solicit bids on two separate contracts: one to supply fill material, and one to build the road. Pet. App. 6. Both contracts were on REA forms and were paid for with the loan money from the Federal Financing Bank, which was guaranteed by the REA. Under the REA's regulations, only the contract to build the road required the REA's approval (J.A. 24, 29, 30-34; GXs 3-N, 5D). Nevertheless, Seminole employees consulted with an REA official several times about the procedure for bidding that contract as well as the fill contract (J.A. 31-32).

Conover was responsible for adding Tanner's company, Citrus Sand and Clay Co., to the list of companies eligible to bid on the contracts. He represented that Citrus Sand and Clay was experienced in road construction, even though the firm had only recently been incorporated and had not previously done any road building at all. 2/16 Sherrill Tr. 21; 16 Tr. 85-87.

Conover's procurement department prepared the final specifications for the two contracts. The final specifications, which were nearly identical to those

that Conover had received from one of Tanner's engineers (4 Tr. 111-112, 119-120; 5 Tr. 22; GXs 3-A, 3-N), favored Tanner's company in several respects.[4]

Shortly after the bid solicitation was announced, Tanner awarded Conover a management contract to run Tanner's condominium complex. Three days later, Tanner lent Conover $6,000 to permit him to close on the condominium he had previously agreed to purchase from Tanner's company. A notation on the check stated that the payment was a real estate commission. Pet. App. 5; 6 Tr .74; 9 Tr. 48-49, GXs 12-B, 19.

On May 14, 1981, the day after Tanner made the $6000 payment to Conover, Seminole awarded Tanner both contracts for the construction of the patrol road. Pet. App. 6-7. Earlier that spring, Tanner had stated to a third party that he expected to receive the contracts; he commented that he "damn well better * * * because it cost him a condominium" (7 Tr. 187-189).

Conover handled several problems that subsequently arose with Tanner's contracts. When a dispute arose between Seminole and Tanner over the allocation of

[4] First, the requirement of a minimum 20 percent limerock content eliminated several potential bidders who could have supplied a sand and clay mixture. Second, because Tanner's mine was relatively undeveloped, and thus still had a great deal of overburden above the limestone deposits, it was a relatively easy task for him to remove the overburden and then mix in only the minimum amount of limerock necessary to meet the contract specifications. Third, the time for submitting bids was made very short, which eliminated several potential bidders, who did not have time to perform the necessary testing and inspections. Tanner did not face that difficulty, because he was already supplying material at the site on a purchase order basis. Pet. App. 6; 2 Tr. 9-11, 15; 4 Tr. 119, 128-129, 154-155; 5 Tr. 83, 89, 94, 102, 105, 107-108, 110; GXs 3-E, 3-F, 3-G.

certain maintenance costs, Conover advised Seminole that it should pay the costs, which Seminole did. And when the REA notified Seminole that Tanner's bonding company was unacceptable, Conover wrote letters to other bonding companies in which he stated that the road was "essentially" completed, when, in fact, the road was less than half finished. Pet. App. 7.

The patrol road was completed in October 1981. In June 1981, however, before the road was finished, representatives of one of the members of Seminole requested that Seminole terminate all business relations with Tanner, based on alleged improprieties in the awarding of the contracts. Pet. App. 7-8. Following an internal investigation, Seminole suspended and later demoted Conover because of his violation of Seminole's conflict of interest policies (*id.* at 8; J.A. 73-74).

2. The judgments of conviction in this case were entered on March 9, 1984, and sentencing was set for April 20, 1984. The day before sentencing, Tanner filed a motion, in which Conover subsequently joined (J.A. 119), seeking permission to interview the jurors and requesting a new trial (*id.* at 117).[5] The motion was supported by the affidavit of David Best, Tanner's trial counsel, who alleged that Vera Asbel, one of the jurors, had told him that several male jurors had drunk alcohol during the noon recesses in the course of the trial and had slept during the afternoons (*id.* at 247). The district court postponed the sentencing and directed the parties to file memoranda regarding whether they should be per-

[5] Under Local Rule 2.04(c) of the Middle District of Florida, attorneys are barred from contacting jurors unless they move for an order permitting such an interview. Unless good cause is shown, any such motion must be made within ten days after the verdict and must specify the names and addresses of the persons the attorney wishes to interview.

mitted to interview jurors, and if so, what the scope of the interviews should be (*id.* at 119, 123).

On May 30, 1984, the district court held a hearing on petitioners' motion (J.A. 124-176). The court denied the motion on two grounds. First, the court held that the juror's allegations were inadmissible under Fed. R. Evid. 606(b) to impeach the jury's verdict (J.A. 172, 181-182). The court rejected petitioners' claim that their allegations of juror misconduct concerned an improper "outside influence," within the meaning of Rule 606(b), and therefore were excepted from the Rule's prohibition on juror testimony (J.A. 128, 143-144, 152). The court, however, invited petitioners to call any nonjuror witness, including courtroom personnel who had had the opportunity to observe the jury, to testify in support of their motion for a new trial (*id.* at 169, 171). Petitioners declined the invitation, although Tanner's counsel stated that he had seen jurors sleeping on several occasions and that he had once observed a juror in a "giggly mood" (*id.* at 168, 169-171). When the judge reminded counsel that he had previously asked the parties to notify him during the trial if they observed jurors sleeping, counsel responded that he did not "think it was appropriate at the time" and that "[i]t was a boring case [and] * * * hot in here on occasion" (*id.* at 168; see *id.* at 147; 12 Tr. 100-101).

Second, the court disputed the thrust of the allegations of juror misconduct made in attorney Best's affidavit, in his testimony, and in an affidavit of an investigator hired by Best (see J.A. 177-180). The judge stated that he had an unobstructed view of the jury during the lengthy trial and had not observed any sign that any juror was sleeping or anything else to suggest juror intoxication, and that if anyone had reported such behavior, he would have remedied the problem at the time (*id.* at 148-149, 167-172).

The judge also emphasized that courtroom employees had in the past reported any jury problems they observed, but that "[n]othing was brought to my attention in this case about anybody appearing to be intoxicated or being intoxicated" (*id.* at 171-172). The judge concluded that based on his observations he was satisfied that the motion to interview the jurors should be denied (*id.* at 173; see *id.* at 181-182).

Notwithstanding the court's order that the parties not interview the jurors, attorney Best spoke with a second juror, Daniel Martin Hardy, on two occasions approximately five months later while this case was on appeal. Best first spoke with Hardy when Hardy purportedly showed up at Best's home unannounced. Best spoke with him a second time when Best telephoned Hardy two days later and arranged for a formal transcribed interview to be conducted by an employee of Best's law firm (Pet. App. 25-27; J.A. 241-242). On neither occasion did Best seek leave of court for the interview. Instead, Best attached the product of the formal interview, an affidavit signed by Hardy, to a second motion for a new trial or for an evidentiary hearing to interrogate the jurors concerning possible juror misconduct (see J.A. 203). In the affidavit, Hardy alleged that several jurors drank beer and smoked marijuana during the luncheon recesses (Pet. App. 27, 29, 31-32, 36-39). He also alleged that two jurors had occasionally ingested cocaine during the luncheon recess (*id.* at 40, 44, 45). Hardy stated that the drinking and drug use had affected his "reasoning ability" one day in the middle of the trial (*id.* at 55) and that the two principal drug users had fallen asleep during the trial (*id.* at 46). The district court denied the second motion on the same grounds that it had denied the first (J.A. 255-258).

3. The court of appeals affirmed (Pet. App. 3-16). The court rejected petitioners' claim that the district court erred in refusing to conduct an evidentiary hearing that included examination of the jurors (*id.* at 8). The court concluded that the affidavit did not "allege that prejudicial information was brought to the jury's attention [or] * * * that any outside influence was brought to bear upon any juror" (*id.* at 10). Accordingly, the court concluded, no evidentiary hearing was warranted (*ibid.*, citing Fed. R. Evid. 606(b)). The court added that "[e]ven if the allegations of substance abuse were true, [petitioners had not made an] 'adequate showing of extrinsic influence to overcome the presumption of juror impartiality'" (*ibid.*, quoting *United States* v. *Barshov*, 733 F.2d 842, 851 (11th Cir. 1984), cert. denied, 469 U.S. 1158 (1985)). Finally, the court rejected petitioners' claim that the indictment failed to charge and the evidence at trial failed to prove a conspiracy "to defraud the United States" within the meaning of 18 U.S.C. 371. Pet. App. 10-13.

SUMMARY OF ARGUMENT

1. Petitioners' conduct constituted a conspiracy to defraud the United States, within the meaning of 18 U.S.C. 371. Section 371 makes unlawful a conspiracy to defraud an agency of the United States "in any manner or for any purpose," which includes "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Haas* v. *Henkel*, 216 U.S. 462, 479 (1910). Petitioners' conspiracy defrauded the United States because it undermined the REA's rural electrification program, which was being implemented by Seminole with federal money and under the REA's direct supervision.

Section 371 does not require proof that the defendants' conduct resulted in a pecuniary loss to the United States or that it violated any other federal law. Nor must the United States be the immediate object of the fraud. In any event, however, petitioners' conspiracy exposed the United States to pecuniary loss by diverting federal funds, by causing pecuniary injury to Seminole, which was responsible for repaying the federal loan, and by violating federal requirements that were designed to ensure meaningful and substantial REA supervision over Seminole's use of the federal loan proceeds.

A fraud against a private entity constitutes a fraud against the United States when the private entity is an intermediary which, pursuant to contract or statute, is in effect acting on behalf of the federal government. In this case, Seminole was an intermediary performing the federal function of using federal funds to bring electric power to rural areas. Where, as in this case, one of the conspirators is employed by the private entity and has official responsibilities for the implementation of the federal program, the federal nature of the fraud is undeniable.

2. The district court did not abuse its discretion in denying petitioners' motions for a new trial without holding an evidentiary hearing to interrogate the jurors. In considering Fed. R. Evid. 606(b), Congress faced the very issue presented in this case—whether jurors should be permitted to testify, after reaching their verdict, concerning allegations of juror intoxication. Congress concluded that the overall risk to the jury system of allowing such testimony outweighs the benefits to litigants in isolated cases from permitting such inquiries. Rule 606(b) therefore prohibits juror testimony for the purpose of impeaching the jury's verdict, with two limited exceptions: to determine "whether extraneous prejudicial information was improperly brought to the jury's

attention" and to determine "whether any outside influence was improperly brought to bear upon the jury." As the legislative history of Rule 606(b) makes clear, neither of these exceptions applies to allegations, such as those in this case, that a juror voluntarily ingested alcohol or drugs.

The policy underlying Rule 606(b) and the restrictive common law rule on which it is based is a sound one. Permitting jurors to be called, after verdict, to testify about the behavior of other jurors during the trial would invite the harassment of jurors and the risk of manipulation of the jury system by unscrupulous litigants. Although juror interrogation might seem justified in a particular case, the instances in which juror interrogation will disclose a disturbing degree of juror intoxication or inattentiveness are too rare to justify the risk of harassment and manipulation that would likely accompany a system permitting juror interrogation whenever a defendant makes a colorable claim of misconduct within the jury.

Even if Rule 606(b) did not preclude juror testimony concerning petitioners' allegations of juror intoxication, the district court would not have abused its discretion in denying petitioners' motions. The thrust of petitioners' allegations accompanying both its first and second motions was juror inattentiveness due to intoxication. The court properly discounted the allegations based on its own observations of the jury during the trial, as well as the failure of any of the parties or any of the courtroom employees to report any apparent misconduct or inattentiveness by any of the jurors. The court was also entitled to ignore the juror's affidavit filed in support of petitioners' second motion, because that affidavit was the product of petitioners' violation of the court's order barring interviews of any juror without prior judicial

approval. For those reasons, the court was not required to resort to the extraordinary step of interrogating jurors.

Finally, the Sixth Amendment does not require a trial court to allow interrogation of jurors in response to allegations of juror intoxication. Evidentiary hearings are required in cases involving claims of extrinsic influence, because those claims involve violations of the sanctity of the jury and because they are usually susceptible to evaluation only through a hearing. By contrast, allegations of juror incompetence or inattentiveness necessarily touch on matters more internal to the jury's decisionmaking process. In addition, they are more often reflected in juror behavior that is observable during the trial, either by the judge, by counsel, by court personnel, or by other members of the jury who may report the matter to the court before the trial ends. For these reasons, the Sixth Amendment does not mandate juror interrogation with respect to allegations of juror misconduct of the kind made by petitioners in this case.

ARGUMENT

I. PETITIONERS' CONDUCT CONSTITUTED A CONSPIRACY TO DEFRAUD THE UNITED STATES IN VIOLATION OF 18 U.S.C. 371

Petitioners argue that while they may have committed a fraud upon Seminole or violated its internal conflict of interest policies, they did not defraud the "United States, or an[] agency thereof," within the meaning of 18 U.S.C. 371. The fraud in this case, however, resulted in a direct injury to the REA's rural electrification program, which was being implemented by Seminole with federal money and under the REA's direct supervision. The happenstance that Seminole was the immediate victim of petitioner's fraudulent activities does not place petitioners' conduct outside the reach of Section 371.

A. Petitioners Violated Section 371 By Conspiring To Interfere With And Obstruct The Lawful Functions Of The REA

1. The language of Section 371 is broad. It makes unlawful a conspiracy to defraud the United States or a federal agency "in any manner or for any purpose." The statute contains "no words of limitation whatsoever and no limitation that could be implied from the context." *United States* v. *Cohn*, 270 U.S. 339, 346 (1926); see *United States* v. *Yermian*, 468 U.S. 63, 71 (1984).

Based on the breadth of the statutory language, this Court has rejected the argument that the term "defraud" in Section 371 is confined to its common law meaning. *Dennis* v. *United States*, 384 U.S. 855, 861 (1966); *United States* v. *Keitel*, 211 U.S. 370, 393 (1908). Instead, the Court has repeatedly concluded, "the statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Haas* v. *Henkel*, 216 U.S. 462, 479 (1910); see *Dennis* v. *United States*, 384 U.S. at 861; *Glasser* v. *United States*, 315 U.S. 60, 66 (1942); *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924).

Petitioners' conduct fell within Section 371 because it impaired the lawful function of the REA, a federal agency. For the purpose of self-enrichment, petitioners corrupted the implementation of a federal project sponsored and supervised by the REA. They did so by engaging in collusive bidding practices that were designed to circumvent the federal requirement that contracts be awarded to the lowest responsible bidder, and by making fraudulent misrepresentations that interfered with the ability of the federal government to supervise the project. As a result of their fraudulent conduct, petitioners impaired the REA's

ability to ensure the achievement of federal objectives and to protect federal property interests.

2. Ever since President Roosevelt established the REA in 1935 and Congress enacted the agency's organic legislation one year later,[6] the REA has achieved dramatic success in promoting rural electrification by making or guaranteeing loans to private and public intermediaries and by then carefully supervising their expenditure of the loan monies. See generally 11 N. Harl, *Agricultural Law* §§ 98.01-98.06 (1986); REA, *A Brief History of the Rural Electric and Telephone Programs* (1985). The federal interest in the proper expenditure of the $1.1 billion loan proceeds in this case was safeguarded by provisions in the loan agreement and in REA Bulletins and REA memoranda to loan recipients (see J.A. 60). REA rules and regulations provided for substantial ongoing federal supervision of the project, including management takeover should a default occur (*id.* at 62). The regulations also provided for protection of the government's security interest in the property (*id.* at 66).[7] In particular, pursuant to the loan contract, Seminole was required to ensure that the loan monies were expended "only for such of the purposes specified in the statement of purposes * * * as shall have been approved by [the REA]"

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[6] See Exec. Order No. 7037 (May 11, 1935); Act of May 20, 1936, ch. 432, 49 Stat. 1363, 7 U.S.C. 901 *et seq.*; see also Act of Apr. 8, 1935, ch. 48, 49 Stat. 115 *et seq.*

[7] The mortgage (GX 1-H) also protected the government's interest in the property by requiring Seminole not to encumber any property that was subject to the lien of the mortgage (*id.* at 7), to maintain the mortgaged property in good repair and condition (*id.* at 8), to secure various types of insurance to protect the property (*id.* at 10-12), and not to employ any individual as a general manager without the REA's prior approval (*id.* at 16).

(*id.* at 59) and that the system was constructed by responsible contractors, ordinarily "the lowest responsible bidder" (*id.* at 60, 61). The REA also required Seminole to obtain the agency's approval prior to letting out certain contracts (*id.* at 65, 68, 80-81) and to follow specified REA procedures (*i.e.*, formal bidding, informal bidding, informal quotes) in awarding all contracts; the specific procedure required depended on the type of contract involved (see *id.* at 83, 105-108). The stated purposes of the REA contract approval and bidding requirements included "protecting the security interests of the Government's loans" and ensuring that "the costs of construction, materials, and equipment [were] reasonable and within the limits of economic feasibility" (*id.* at 77; see 2 Tr. 63; 2/22 Wright Tr. 69). Hence, even if REA prior approval was not required, the REA reserved the right to challenge contracts that were later submitted for review (J.A. 24-27). Finally, the loan contract required Seminole to warrant that every statement, certificate, and opinion "submitted to the Government by it or in its behalf [would be] true and correct" (*id.* at 68).

The funds for the two contracts that were the subjects of petitioners' fraud originated in REA's guaranteed loan (see J.A. 24), and at least one of the two contracts required prior REA approval (*id.* at 32, 42-45). Both contracts were subject to REA's supervision: Seminole was required to follow REA procedures in awarding each contract (see *id.* at 108), and the failure to do so could be the basis of REA's declaring Seminole in default. Nor was REA's involvement in the contracts only theoretical. Seminole employees consulted an REA official on several occasions about the bidding procedures on the two contracts (*id.* at 31-32; see also *id.* at 24-28; 2 Tr. 57-64).

The necessary effect of petitioners' corrupt practices was to interfere with Seminole's ability to comply with REA contractual requirements and with the REA's ability to supervise Seminole's administration of the federal funds. As a result, the fraud interfered both with the accomplishment of federal objectives and with the protection of federal property. In short, petitioners' conspiracy had the effect of "interfer[ing] with or obstruct[ing]" the REA's "lawful * * * functions by deceit, craft or trickery" (*Hammerschmidt* v. *United States*, 265 U.S. at 188) and therefore violated Section 371.

Petitioners' contention that Section 371 does not apply to their fraudulent activities rests on two propositions. First, they argue (Br. 17, 22) that Section 371 does not apply because their activities did not cause the federal government any pecuniary loss and did not violate any other federal statute or regulation. Second, they contend (Br. 16-17, 24-25, 27-28) that while they may have committed a private fraud upon Seminole, the project was not sufficiently "federal" to come within the scope of the federal statute. Neither argument is persuasive.

B. Section 371 Does Not Require Proof Of Pecuniary Loss Or A Violation Of Another Provision Of Federal Law

1. It has long been settled that the government need not demonstrate pecuniary loss to obtain a conviction under Section 371. See, *e.g.*, *Haas* v. *Henkel*, 216 U.S. at 479; *United States* v. *Keitel*, 211 U.S. at 394; *Hyde* v. *Shine*, 199 U.S. 62, 81-82 (1905). "[D]efrauding the government of its right and its facilities for rendering a proper service to the people * * * cuts deeper than defrauding the government of a wheelbarrow, and it is unquestionably within the

power of the government to protect itself against that kind of a fraud." *Curly* v. *United States*, 130 Fed. 1, 9 (1st Cir.), cert. denied, 195 U.S. 628 (1904); see *United States* v. *Bradford*, 148 Fed. 413, 421-422 (E.D. La. 1905), aff'd, 152 Fed. 616 (5th Cir.), cert. denied, 206 U.S. 563 (1907) ("It is certainly just as important that the government should not be defrauded with regard to its operations, even if no pecuniary value is involved, as that it should not be defrauded of its property. * * * [I]t would be astonishing, indeed, if Congress had failed to afford protection against such frauds.").

There is likewise nothing to support petitioners' claim that their convictions must be overturned because their conduct did not violate any federal statutory or regulatory requirement. Section 371 by its terms does not require proof of a violation of any other federal law,[8] and this Court has not required that the means used to do so violate any other federal law. It is enough, the Court has said, that the defendants agree to interfere with or obstruct a lawful governmental function "by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention." *Hammerschmidt* v. *United States*, 265 U.S. at 188.[9]

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[8] The statute is written in the disjunctive. The first portion, which is the general federal conspiracy statute, requires proof of an agreement to commit a federal offense. The second portion, which prohibits conspiracies to defraud the United States, contains no such requirement.

[9] It is, of course, unnecessary to show that the defendants knew or intended that the United States would be the victim of their fraudulent conduct. It is enough that they willfully conspired to engage in fraudulent conduct and that the United States was in fact a victim of the fraud. See *United States* v. *Feola*, 420 U.S. 671, 687-688 (1975).

2. Even under petitioners' narrow reading of Section 371, their fraudulent conduct would fall within the statutory prohibition. Petitioners' conspiracy to defraud risked pecuniary loss to the federal government and violated federal requirements established by its contract with Seminole.

Petitioners' fraudulent conduct plainly increased the risk of financial loss to the federal government. The $1.1 billion loan for the project consisted of federal funds, and the loan was guaranteed by the REA, a federal agency. The fraudulent diversion of the project funds thus constituted a diversion of federal loan monies. In addition, the fraudulent diversion of funds from the project increased the risk that Seminole would be unable to complete the project within the amount budgeted and thus would default on the loan. The proper use of the federal funds as well as the security of the government's investment in the project therefore depended on the honest administration of the loan proceeds.

The government proved at trial that pursuant to petitioners' conspiracy, Conover failed to explore alternative construction techniques (Pet. App. 5) and drew up contract specifications to ensure that Tanner would be awarded the contract (*id.* at 6), thereby precluding other more qualified and lower cost businesses from receiving the contract (*ibid.*). Moreover, because Tanner's fill material proved inadequate for the job, Seminole had to purchase from Tanner a supplemental fill material ("clear sand") at a price higher than others had been willing to charge (*id.* at 7). In addition, Conover advised Seminole to re-

solve a contract dispute over costs in Tanner's favor (*id.* at 6), and he misrepresented Tanner's progress on the contract to bonding companies (*id.* at 7).[10]

As we have noted, petitioners' fraudulent conduct also violated several federal requirements established by the loan agreement and mortgage with Seminole and further detailed in REA bulletins and memoranda to recipients of REA loan guarantees. For instance, the corrupt bidding practices engaged in by petitioners flatly violated the REA bidding requirements (see J.A. 60-61, 83, 105-108) and the REA requirement that Seminole warrant that its statements to the REA would be "true and correct" (*id.* at 68). Although REA policy provided Seminole with the option of using either informal competitive bidding or informal quotes in the awarding of the particular contract at issue in this case (see *id.* at 32, 83), neither option sanctioned the collusive and deceitful practices petitioners employed. Those federal policies were designed, of course, to protect the federal interest in the project against precisely the kind of misconduct that is at issue in this case. Thus, petitioners are mistaken in asserting that their conspiracy did not fall within Section 371 because it did not offend any specific federal regulations or policies.

C. Section 371 Does Not Require Proof That The United States Was The Immediate Object Of Petitioners' Fraudulent Activities

1. Petitioners' second principal defense—that the REA project was not sufficiently "federal" in character to fall within the scope of Section 371—is similarly without merit. It is no bar to prosecution under Section 371 that a federal agency is not the immediate object of the fraud. Indeed, even under the common law of fraud, the false representation "need not be made directly by the defendant to the victim. A conviction may be had where the accused causes the representation to reach the victim through the intervention of an innocent third person or persons, or where the representation is made to and the property obtained from one person, though the loss falls upon a third person and the intent was to defraud him." II H. Brill, *Cyclopedia of Criminal Law* § 1244, at 1892 (1923) (footnotes omitted). The scope of Section 371, moreover, is even broader than the common law crime.

To be sure, the classic case of conspiracy to defraud the United States within the meaning of Section 371 occurs when the conspirators are dealing directly with the federal government, particularly when one conspirator is a federal employee with official responsibilities. See, *e.g.*, *Mammoth Oil Co.* v. *United States*, 275 U.S. 13, 35-36 (1927); *Crawford* v. *United States*, 212 U.S. 183 (1909); *Carter* v. *McClaughry*, 183 U.S. 365, 367-368 (1902). It is well settled, however, that it is no less a fraud upon the federal government when the immediate object of the fraud is an intermediary which, pursuant to a contractual undertaking or by statutory design, is in effect acting on behalf of the federal government. Decisions of this Court involving Section 371 prosecutions reflect this understanding of the statute's scope (see *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949) (Section 371 prosecution premised on subcontractor fraud upon a general contractor of the

[10] It is no answer that petitioners' fraud was small in comparison to the size of the project. There is no *de minimis* defense to fraud charges; the diversion of $10,000 from a $10,000,000 project is no different analytically from the diversion of $10,000 from a $100,000 project.

Navy)) as do numerous decisions of this Court construing related statutory provisions. See *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976) (False Claims Act); *United States* v. *Hess*, 317 U.S. 537, 541-545 (1943) (same);[11] *Dixson* v. *United States*, 465 U.S. 482, 496-500 (1984) (federal bribery statute). In addition, numerous court of appeals decisions have upheld Section 371 prosecutions when the immediate object of the fraud has been a non-federal public or private intermediary responsible for administering a federally sponsored program.[12]

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[11] Because the False Claims Act is not as broad as Section 371, fraudulent conduct barred by the former should invariably be prohibited by the latter.

[12] See, *e.g.*, *United States* v. *Lane*, 765 F.2d 1376, 1378-1380 (9th Cir. 1985) (immediate object of contract fraud a state agency administering federal Social Security Title IV(A) and Title XX funds to train state employees providing community services); *United States* v. *Pintar*, 630 F.2d 1270, 1274-1275, 1277-1278 (8th Cir. 1980) (fraud in grant application processing upon federally funded regional commission designed to encourage economic development in parts of the upper middle west); *United States* v. *Burgin*, 621 F.2d 1352, 1354-1357 (5th Cir.), cert. denied, 449 U.S. 1015 (1980) (contract fraud upon state agency responsible for administering federal Title XX funds to provide services to various Head Start centers); *United States* v. *Anderson*, 579 F.2d 455, 457-458 (8th Cir.), cert. denied, 439 U.S. 980 (1978) (contract fraud upon county agency administering federal highway funds); *United States* v. *Hay*, 527 F.2d 990, 992-993, 997-998 (10th Cir. 1975), cert. denied, 425 U.S. 935 (1976) (loan agreement fraud upon foreign government (South Vietnam), which was lent federal money to finance a new water system); *United States* v. *Del Toro*, 513 F.2d 656, 658 (2d Cir.), cert. denied, 423 U.S. 826 (1975) (contract fraud upon city agency responsible for administering federal Department of Housing and Urban Development project); *United States* v. *Thompson*, 366 F.2d 167, 169, 171-173 (6th Cir. 1966), cert. denied, 386 U.S. 945 (1967) (contract fraud upon federally financed county hospital); *Harney* v. *United States*, 306 F.2d 523, 525-526 (1st Cir.), cert. denied, 371 U.S. 911 (1962) (condemnation appraisal fraud upon state agency receiving federal highway funds); *Langer* v. *United States*, 76 F.2d 817, 824 (8th Cir. 1935) (fraud upon state relief committee responsible for distribution of federal relief funds); *United States* v. *Furer*, 47 F. Supp. 402, 407 (S.D. Cal. 1942) (contract fraud upon private company responsible for administering federal funds in contracting for construction of military tools and parts); see also *United States* v. *Wheadon*, 794 F.2d at 1279-1280, 1282-1283 (fraud upon state agency disbursing HUD funds a conspiracy "to defraud the United States," within meaning of False Claims Act, 18 U.S.C. 286).

Where, as in this case, one of the conspirators is employed by the intermediary and has official responsibilities in the implementation of the federal program, including the disbursement of funds originating with the federal government, the federal nature of the fraud is virtually undeniable. See, *e.g.*, *United States* v. *Lane*, 765 F.2d 1376, 1378-1380 (9th Cir. 1985); *United States* v. *Anderson*, 579 F.2d 455, 457-458 (8th Cir.), cert. denied, 439 U.S. 980 (1978); *United States* v. *Del Toro*, 513 F.2d 656, 658 (2d Cir.), cert. denied, 423 U.S. 826 (1975); *United States* v. *Harding*, 81 F.2d 563, 564-567 (D.C. Cir. 1936); *United States* v. *Furer*, 47 F. Supp. 402, 407 (S.D. Cal. 1942). Cf. *Dixson* v. *United States*, 465 U.S. 482 (1984); *United States* v. *Wheadon*, 794 F.2d 1277, 1279-1283 (7th Cir. 1986).[13] Hence, in

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[13] Under this Court's analysis in *Dixson*, petitioner Conover would likely qualify as a "public official" within the meaning of the federal bribery statute, 18 U.S.C. 201(a). Cf. *United*

this case, as in *United States* v. *Hess*, 317 U.S. at 544, "[t]he fraud * * * [w]ould not have been any more of an effort to cheat the United States if there had been no * * * intermediary."

D. Neither The Rule Of Lenity Nor Principles Of Federalism Compel A Narrower Construction Of Section 371

Contrary to petitioners' claim, upholding the convictions in this case does not depend on a construction of Section 371 with "almost limitless boundaries" (Br. 28). Our interpretation of the statute is consistent with the settled judicial construction of the law as reflected both in the decisions of this Court and in decades of lower court decisions.

We fully agree that the government must establish some injury to the United States to prove a violation of Section 371. We assert only that, as this Court has repeatedly held, it is sufficient that the government prove that injury by demonstrating that the

States v. *Wheadon*, 794 F.2d at 1282-1283. Like the private employee in *Dixson*, Conover's official duties as procurement officer for Seminole "directly influenced the expenditure of federal funds" (465 U.S. at 499). And, like the private employee in *Dixson* (see *id.* at 485), Conover used his official position to extract kickbacks from a contractor (Tanner) seeking work. To be sure, it is not a prerequisite to a successful prosecution under Section 371 that a member of the conspiracy occupies an employment position with the intermediary that renders the conspirator the equivalent of a "public official" for the purposes of the federal bribery law (see, *e.g.*, *United States* v. *Del Toro*, 513 F.2d at 663-664, 658). Where, however, a member of the conspiracy is an official acting on behalf of the United States, the conclusion is inescapable that the fraudulent conduct constitutes a conspiracy "to defraud the United States" within the meaning of Section 371.

conspiracy contemplated interference with or obstruction of lawful federal functions.

Our construction of Section 371 would not mean, as petitioners claim (Br. 28-29 (emphasis in original)), that "*every* person who engages in any kind of wrongful conduct against a person or entity receiving governmental assistance, no matter how indirect, or affected by a government program, no matter how slightly, will be subject to a Section 371 prosecution." Plainly, Section 371 does not apply to fraudulent conduct against any entity that receives some amount of federal financial assistance or is subject to some form of federal regulation. Cf. *Dixson*, 465 U.S. at 499.[14] Instead, there must be substantial

[14] Petitioners suggest (Br. 29) that the court of appeals' construction of Section 371 would improperly reach cases of fraud committed by a broker and seller against a buyer who takes out a Federal Housing Authority or Veterans Administration loan. In fact, a fraud committed by a broker and seller that is designed to result in the buyer's obtaining a federally guaranteed loan that would not otherwise be available falls squarely within the reach of Section 371. See *Heald* v. *United States*, 175 F.2d 878, 880 (10th Cir.), cert. denied, 338 U.S. 859 (1949) ("Concealing [by the broker and seller] of the actual selling price for the purpose of obtaining a [VA] guaranteed loan which could not be obtained were such price known, impairs the functions of the Veterans Administration and conspiracy to do so states an offense against the United States."); see also *Ross* v. *United States*, 180 F.2d 160, 163-165 (6th Cir. 1950); *McClanahan* v. *United States*, 230 F.2d 919, 921-922 (5th Cir.), cert. denied, 352 U.S. 824 (1956). In any event, in this case one of the conspirators was employed by the entity that was the immediate object of the fraud, and in that capacity he was directly responsible for the disbursement of the funds received from the federal government. Hence, the more appropriate analogy would be to a fraud committed by a bank official and a borrower to obtain a federally guaranteed loan through the bank. Without question, Section 371 would make unlawful a conspiracy that

ongoing federal supervision of the defrauded intermediary or delegation of a distinctly federal function to that intermediary to render a fraud upon the intermediary a fraud upon the "United States," within the meaning of Section 371.[15] In this case, both of those factors are present. Section 371 thus unambiguously extends to conduct such as petitioners', and the rule of lenity therefore does not call for a narrower construction that would remove them from the reach of the statute. See *Dixson* v. *United States*, 465 U.S. at 500 n.19; *United States* v. *Moore*, 423 U.S 122, 145 (1975); *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974).[16]

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embraced such fraudulent conduct. See, *e.g.*, *United States* v. *Levinson*, 405 F.2d 971, 975-976, 981-986 (6th Cir. 1968), cert. denied, 395 U.S. 958 (1969) (VA guaranteed loans); see also *United States* v. *Del Toro*, 513 F.2d at 658.

[15] Petitioners' reliance (Br. 20-21) on *United States* v. *Gradwell*, 243 U.S. 476 (1917), and *Hammerschmidt* v. *United States*, 265 U.S. 182 (1924), is misplaced. In *Gradwell*, it was clear that Congress did not intend Section 371 to apply at all to elections, including election fraud, with which Congress had exhaustively dealt elsewhere (see 243 U.S. at 481-485). In *Hammerschmidt*, it was equally clear that the words "to defraud" were not so broad as to encompass individuals advocating that others defy federal draft laws. In this case, however, petitioners' fraudulent conduct is at the core of traditional fraud—corruption in the award of contracts—and petitioners' conspiracy obstructed the REA's rural electrification project.

[16] Petitioners also suggest in passing (Br. 16, 24) that applying Section 371 to them would violate their rights under the Due Process Clause of the Fifth Amendment. This constitutional claim was not raised in the district court or in the court of appeals in the first instance, and petitioners made only oblique references to it in their petition for rehearing below (at 10) and in their petition for a writ of certiorari (at 15). The issue is therefore not properly before this Court.

Petitioners' reliance (Br. 27-28) on "principles of federalism" is also unpersuasive. Petitioners claim (*id.* at 27) that our construction of Section 371 would render "traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." The construction of Section 371 we propose is not so sweeping. There is a strong federal interest in prosecuting individuals for corrupt misuse of federal funds. See *Dixson*, 465 U.S. at 500-501. Where federal funds or federal programs are victimized by fraud, it is entirely appropriate to rely on federal law to remedy the problem. The mere presence of an intervening private entity that is disbursing the federal funds or operating the federal program does not convert an essentially federal program into a matter of exclusive state and local concern.

As the REA loan agreement at issue in this case makes plain, it is often critically important to the success of federal programs that the power to choose among potential contractors remain free of corruption. For this reason, the federal government often maintains a substantial federal presence even when it has left the implementation of federal objectives to nonfederal entities that the federal government has financed. There is nothing "intrusive" about interpreting federal criminal law to protect federally financed and supervised projects from corruption. Certainly, the federal interest in such projects is sufficient to ensure that principles of federalism are not of-

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See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, their conduct occurred after the Fifth Circuit's decision in *United States* v. *Burgin*, 621 F.2d 1352 (1980), a case similar to this one; at least as of that time petitioners were on notice that they were subject to federal prosecution.

fended by permitting the United States to exercise concurrent jurisdiction over fraudulent conduct in the operation of the projects.[17]

II. PETITIONERS ARE NOT ENTITLED TO A HEARING TO QUESTION JURORS ABOUT ALLEGATIONS OF ALCOHOL AND DRUG USE DURING THE TRIAL

The strength of the jury system—its reliance on peer judgment—is also the source of its frailty. Jurors are ordinary citizens. They are not specially selected arbiters or trained experts, and they are not expected to give an accounting of the reasons for their verdicts. Recognizing the special nature of the jury process, courts and legislatures historically have allowed only limited inquiry into the way the jury conducts its affairs. In particular, out of respect for juror privacy and to prevent juror harassment and tampering, the courts have largely prohibited post-

[17] Petitioners argue (Br. 30 n.12) that if the Court overturns their convictions on the Section 371 count, it must also reverse their mail fraud convictions. We do not believe that is so. The mail fraud charges were based not only on the fraud against the United States, but also on the fraud against Seminole (J.A. 12-15). Moreover, the court's jury instructions on the mail fraud counts focused exclusively on the private fraud as the basis for those charges (see 18 Tr. 21-26). In any event, even if the jury based its mail fraud verdicts on the fraud against the United States, the jury could not have found that the United States was defrauded without also finding that Seminole was defrauded. Therefore, regardless of the disposition of the Section 371 count, petitioners' convictions on the mail fraud counts can be upheld. Because the mail fraud counts can be sustained without the need for a new trial, the Court should reach the jury misconduct issue in this case even if it rules in petitioners' favor on the Section 371 issue.

verdict interrogation of jurors as a means of impeaching jury verdicts.

Petitioners invite this Court to depart from that practice and to expand the grounds for impeachment of verdicts and interrogation of jurors. The invitation should be declined. Congress considered the very issue presented by this case when it enacted Rule 606(b) of the Federal Rules of Evidence in 1975. At that time, Congress rejected proposals to expand the grounds for post-trial impeachment of jury verdicts, and in our view the Sixth Amendment does not displace that congressional judgment. Accordingly, we submit that the district court did not abuse its discretion in declining to grant petitioners' motions for a new trial or an evidentiary hearing to interrogate jurors for impeachment purposes.

Contrary to petitioners' contention (Pet. i; Br. i), this case does not present the question whether petitioners are entitled to an evidentiary hearing concerning their allegations of juror misconduct. The district court held a limited evidentiary hearing on the first motion, at which Tanner's counsel testified. At that time, the district court invited petitioners to call any witness, other than a juror, or to offer any other evidence that might support their allegations of juror misconduct (see J.A. 169-171).

Petitioners were not satisfied with that kind of hearing. Instead, the focus of both of their post-trial motions was to request a hearing at which they could interrogate the jurors (J.A. 113-117, 203). The district court's rulings denying petitioners' requests were directed to that aspect of their motions (*id.* at 125, 181-182, 255-258). The court concluded that Fed. R. Evid. 606(b) barred the introduction of juror testimony regarding the allegations of juror

misconduct, but that, in any event, the court's opportunity to observe the jury during the lengthy trial obviated any need for the extraordinary remedy of juror interrogation (*id.* at 147-149, 167-173). Accordingly, the question presented by this case is whether the district court erred in refusing to allow petitioners to interrogate the jurors, either in an evidentiary hearing or in some other setting.

A. Rule 606(b) Bars Juror Testimony About Alleged Juror Intoxication During The Trial

1. The common law flatly prohibited the introduction of juror testimony to impeach a jury verdict. See *Vaise* v. *Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785); 8 J. Wigmore, *Evidence* § 2352, at 696 (McNaughton rev. ed. 1961). The common law rule was accepted in the United States with what Wigmore termed "an adherence almost unquestioned" (*id.* at 697 (footnote omitted)).

The broad common law prohibition against juror testimony has not been significantly diluted in this country during the last 200 years. This Court has fashioned exceptions to the rule in only limited circumstances. The Court has allowed post-verdict juror testimony to explore the prejudicial effect of the introduction into the jury room of information not admitted into evidence. See, *e.g.*, *Mattox* v. *United States*, 146 U.S. 140, 151 (1892); see also *United States* v. *Reid*, 53 U.S. (12 How.) 361, 362-363 (1851). The Court has also permitted inquiry into jurors' associations with outside parties that might affect their impartiality. See *Rushen* v. *Spain*, 464 U.S. 114, 116, 121 (1983); see also *Smith* v. *Phillips*, 455 U.S. 209, 213-214, 215, 217 (1982). And the Court has permitted jurors to be questioned about efforts by outsiders to influence the jury by bribery,

threats, or expressions of opinion. See *Parker* v. *Gladden*, 385 U.S. 363, 363-364 (1966); *Remmer* v. *United States*, 347 U.S. 227, 228-230 (1954); *Mattox* v. *United States*, 146 U.S. at 150. Beyond those limited settings, however, the Court has repeatedly adhered to the traditional rule against admitting juror testimony for the purpose of impeaching the jury's verdict. See, *e.g.*, *McDonald* v. *Pless*, 238 U.S. 264, 267-269 (1915); *Hyde* v. *United States*, 225 U.S. 347, 384 (1912).

In the leading case of *McDonald* v. *Pless*, 238 U.S. at 267-268, the Court explained in detail the justification for precluding juror testimony even when the allegations, if proved, would provide grounds for a new trial:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

See also *Clark* v. *United States*, 289 U.S. 1, 13 (1933); *Jorgensen* v. *York Ice Machinery Corp.*, 160 F.2d 432, 435 (2d Cir.) (Learned Hand, J.), cert. denied, 332 U.S. 764 (1947) ("[J]udges * * * would become Penelopes, forever engaged in unravelling the webs they wove.").

2. After 14 years of intensive study by members of the bar, judges, and legislators, this Court in 1972 promulgated uniform rules of evidence for the federal courts. In 1975, Congress enacted those rules into law as the Federal Rules of Evidence.[18] One of those rules, Fed. R. Evid. 606(b), in effect codified this Court's precedents regarding the inadmissibility of juror testimony to impeach the jury's verdict. This Court's proposed rule and the version ultimately enacted by Congress, which were identical, prohibited juror testimony for the purpose of impeaching the jury's verdict, with two limited exceptions—to determine "whether extraneous prejudicial information was improperly brought to the jury's attention" and to determine "whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). Hence, unless the proffered juror testimony concerns either "extraneous prejudicial information" or "outside influence," it is not admissible for the purpose of impeaching the jury's verdict.

Petitioners argue (Br. 33-34) that the use of alcohol by a juror falls within the rule's exception for juror testimony regarding "any outside influence [that] was improperly brought to bear upon any juror." The language and legislative history of the rule, however, rebut that contention and show that the "outside influence" exception does not encompass anything a juror does that might incidentally affect his mental processes during the trial or during the jury's deliberations.

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[18] See 51 F.R.D. 315 (1971) (advisory committee version); 56 F.R.D. 183 (1972) (Supreme Court version); Pub. L. No. 93-595, 88 Stat. 1926 *et seq.* (final version as enacted).

a. To extend the exception for "outside influence" to anything a juror voluntarily chooses to ingest would allow the exception to swallow the rule. Under petitioner's construction of the term, anything happening to any juror during the course of the trial (or even before the trial) that might affect the juror's mental processes would constitute an "outside influence." The rule's general prohibition against inquiring into "any matter or statement * * * or the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict" would be rendered nearly meaningless. As the district court aptly noted (J.A. 144):

> If you say that a juror who has something to drink outside the jury room and brings it with him is an outside influence, you might also say that any juror who stayed up half the night watching T.V. or had a big argument with his wife the morning before he came to trial so he was upset for the first half-day wasn't thinking straight, or any juror who had a particularly bad cup of coffee that morning was irritable all day.

No one, of course, can deny that such conditions might affect a juror's behavior in a given case.[19] It has nonetheless been recognized that such speculative

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[19] Indeed, such matters have been the subject of literary speculation:

> "I wonder what the foreman of the jury * * * has got for breakfast," said Mr. Snodgrass.
>
> "Ah!" said Perker, "I hope he's got a good one."
>
> Why so?" inquired Mr. Pickwick.
>
> "Highly important—very important, my dear Sir," replied Perker. "A good, contented, well-breakfasted jury-man, is a capital thing to get hold of. Discontented or hungry jurymen, my dear Sir, always find for the plaintiff."

C. Dickens, *The Pickwick Papers* 449 (N.Y. Heritage Press 1962).

inquiries into the mental processes of a juror must be disallowed if the institution of the jury is to be preserved. See *Model Code of Evidence* Rule 301, illus. 3 (1942) (juror's testimony that "he was induced to agree to the verdict because his wife was ill and he was anxious to get home" inadmissible); see also ABA Project on Minimum Standards of Criminal Justice, *Standards Relating To Trial By Jury* § 5.7 (a), at 171 (1968).

b. The legislative history of Rule 606(b) reveals that Congress considered the precise issue presented by this case—the admissibility of juror testimony regarding juror intoxication—and concluded that such testimony should not be allowed.

Rule 606(b) was the subject of considerable debate. The debate focused on whether the prohibition against juror testimony should extend to certain types of juror misconduct (such as allegations of juror intoxication) and not merely bar inquiry into the effect of certain conduct on the juror's thought processes. The version of Rule 606(b) that was proposed by the Advisory Committee was much shorter than the final version. It included neither the general prohibition against juror "testi[mony] as to any matter or statement occurring during the course of the jury's deliberations" nor the limited exceptions for "extraneous prejudicial information" or "outside influences" that are found in the version that was ultimately enacted. See 51 F.R.D. 387 (1971). Instead, the Advisory Committee proposal simply provided that a "juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or concerning his mental processes" (*ibid.*).

The Advisory Committee's version was the subject of much criticism. In a letter to the Advisory Committee, Senator McClellan criticized the proposed rule because it "would * * * permit the impeachment of verdicts by inquiry into, not the mental processes themselves, but what happened in terms of conduct in the jury room" (117 Cong. Rec. 33642, 33645 (1971)).[20] The Department of Justice voiced similar concerns in its own letter to the Advisory Committee: "The [rule] is a manifest departure from existing law concerning the extent to which jurors may impeach their verdict. * * * Strong policy considerations continue to support the rule that jurors should not be permitted to testify about what occurred during the course of their deliberations" (117 Cong. Rec. 33655 (1971)).

In response to those criticisms, the Advisory Committee drafted a new version, which the Supreme Court in turn formally adopted and transmitted to Congress. The new version embodied the language of the current rule, including the broad prohibition and the two discrete exceptions. See 56 F.R.D. 183 (1972); see also *Rules of Evidence, Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 316 (1973) (letter from Advisory Committee to Senator McClellan).

The issue whether juror testimony concerning allegations of juror intoxication would be allowed under the more stringent, traditional rule promulgated by

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[20] See 117 Cong. Rec. 33645 (1971) (letter from Sen McClellan to Advisory Committee) ("The mischief in this Rule ought to be plain for all to see. * * * I do not believe it would be possible to conduct trials, particularly criminal prosecutions, as we know them today, if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations. * * * I urge that you recognize that trials are human processes and that perfect trials, using lay jurors as the Sixth Amendment rightly commands, are an illusionary goal.").

this Court first explicitly arose during the House Judiciary Committee's consideration of the rule. The House Committee concluded that such testimony would have been allowed under the Advisory Committee's original proposal, but would not be allowed under this Court's version. For that reason, the House Committee amended the rule for the specific purpose of permitting such inquiries. The House Committee report noted that under the Court's version of the rule, a juror could testify "as to the influence of extraneous prejudicial information brought to the jury's attention," such as a radio broadcast or a newspaper article, and a juror could testify about an outside influence, such as a threat to the juror's family, but the Court's rule would not permit a juror to testify "to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations." H.R. Rep. 93-650, 93d Cong., 1st Sess. 9-10 (1973).[21] The House subsequently passed Rule 606(b), as revised by the Judiciary Committee.[22]

The House Committee's discussion of Rule 606(b) made two points clear. First, the Committee wanted the rule to permit juror testimony on allegations of

[21] See *Rules of Evidence (Supplement), Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 389 (1973) [hereinafter cited as *Supplemental House Hearings*] (letter from Prof. R. Carlson to House Committee concluding that misconduct such as "where a jury member consumed half a pint of whiskey during deliberations" would be "insulated from attack" under the version of Rule 606(b) proposed by the Court).

[22] Following the House Report, both Senator McClellan and the Department of Justice reiterated their earlier criticisms of the original Advisory Committee proposal. See *Supplemental House Hearings*, at 53-54 (Senator McClellan), 347 (Department of Justice).

juror intoxication, and second, the Committee did not believe the exception for "outside influence" in the Court's version of the rule permitted such testimony.

The Senate Committee rejected the House version of Rule 606(b) in favor of the more restrictive version promulgated by this Court. See S. Rep. 93-1277, 93d Cong., 2d Sess. 13-14 (1974). The Senate Committee did so with full awareness that the Court's version would have the effects that the House Committee had sought to avoid.[23] The Senate Committee report reflected a preference for the "long-accepted Federal law" in order to avoid "the harassment of former jurors by losing parties, as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors" (*ibid.*). The Conference Committee adopted the Senate version of the rule, which was then enacted into law. H.R. Conf. Rep. 93-1597, 93d Cong., 2d Sess. 8 (1974).

The legislative history thus reveals that Congress asked itself the very question posed by petitioners in this case. After considering and debating the issue, Congress selected "the lesser of two evils" (*McDonald* v. *Pless*, 238 U.S. at 267) by determining that juror

[23] The Senate report noted that the House version of the rule was "considerably broader" than the version proposed by this Court and that the House version "would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of the conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised. * * * Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary * * *. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors." S. Rep. 93-1277, *supra*, at 13-14.

testimony on matters such as allegations of intoxication must be excluded.

c. Finally, the decisions of this Court and related statutory provisions support the conclusion that petitioners' allegations of juror intoxication do not fall within the "outside influence" exception in Rule 606(b). This Court's decisions suggest that "outside influence" is confined to improper efforts of outsiders calculated to influence juror impartiality. None of the decisions of this Court upholding the admissibility of juror testimony for impeachment purposes has involved juror misconduct even remotely similar to that alleged in this case. Instead, each of those cases involved instances in which third parties attempted to influence juror behavior by making remarks to jurors or by bribery or threats. See *Parker* v. *Gladden, supra*; *Remmer* v. *United States, supra*; *Mattox* v. *United States, supra.*

This interpretation of the term "outside influence" is consistent with its origin. Apparently first coined by Justice Holmes in *Patterson* v. *Colorado*, 205 U.S. 454 (1907), the expression was used in discussing the need to protect the jury from attempts by outsiders to influence the jury's deliberations. See 205 U.S. at 462 ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."); see also *Parker* v. *Gladden*, 385 U.S. at 364; *Sheppard* v. *Maxwell*, 384 U.S. 333, 351 (1966).

Related federal statutory provisions reflect a similarly narrow construction of the term. Provisions in the federal criminal code concerned with efforts by third persons to "influence" jurors in the discharge of their duties could not fairly be read as extending to the case of a juror "influenc[ing]" himself by

drinking alcohol or ingesting other substances. Instead, in those provisions, as in Rule 606(b), the exclusive congressional concern is with improper efforts by outside parties to influence the jurors. See 18 U.S.C. 1503, 1504; see also 18 U.S.C. 245(b)(1)(D).[24]

In sum, faced with the difficult choice between protecting the jury process from post-verdict challenge and permitting broad inquiry into allegations of juror misconduct, Congress has chosen the former, more traditional course. Congress has determined that the greater danger to the administration of justice and to the institution of the jury lies in broadening the grounds for jury impeachment, rather than

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[24] Petitioners cite Judge Weinstein's treatise in support of their view that juror intoxication is an "outside influence" within the meaning of the rule (Br. 34, citing 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 606[04], at 606-29 through 606-32 (1985)). Judge Weinstein's treatise, however, does not provide clear support for petitioners' position. At one point, the treatise notes that "[o]utside influence would seem to preclude proof of threats by one juror against the other or chance or quotient verdicts as well as *drunkenness of jurors not observed by outsiders*" (3 *Weinstein's Evidence, supra,* ¶ 606[01] at 606-15 (emphasis added)). In the section on which petitioners rely, the treatise makes the contrary assertion, but it cites as support only two lower court cases decided long before Rule 606(b), neither of which held that juror intoxication constitutes an "outside influence." See *id.* ¶ 606[04] at 606-29 through 606-30 n.25. The decision in *United States* v. *Provenzano*, 620 F.2d 985 (3d Cir.), cert. denied, 449 U.S. 899 (1980), which is also cited in the treatise, provides no support for petitioners' view at all. In that case, several jurors were accused of smoking marijuana. A marshal advised the judge of the problem during the trial, and the judge then spoke to the jurors in chambers. That case sheds no light on petitioners' claim that a party is entitled to interrogate a juror about juror intoxication after the jury has reached its verdict.

in adhering to the traditional rule. That judgment is consistent with this Court's observation in *McDonald* v. *Pless*, 238 U.S. at 268, that "while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors.' The practice would be replete with dangerous consequences. 'It would lead to the grossest fraud and abuse' and 'no verdict would be safe.' "

The allegations of jury misconduct in this case, although dramatic, do not call for abandoning the judgment expressed in this Court's cases and in Rule 606(b). Consistent with the traditional approach to the issue of verdict impeachment, the rule and this Court's decisions reflect a judgment that the cost of permitting jurors to testify in support of post-trial challenges to verdicts is very high. For that reason, juror testimony on such subjects should be foreclosed, even if, in a particular case, such an inquiry might seem factually justified. The risk of manipulation and juror harassment is too great, and the cases in which relief would be justified are too few, to justify an exception to the general rule permitting juror interrogation in every case in which a colorable claim of misconduct is raised.

B. Apart From Rule 606(b), The District Court Did Not Abuse Its Discretion By Refusing To Permit Interrogation Of The Jurors

Even if Rule 606(b) did not preclude juror testimony in this case, the district court did not abuse its discretion by denying petitioners' motions for an evidentiary hearing to interrogate the jurors. The district court did not rely solely on Rule 606(b) to support its denial of petitioners' motions. The court also relied on its own evaluation of the substance of petitioners' preliminary showings of juror misconduct in determining that the extraordinary remedy of juror interrogation was inappropriate. In our view, the court's independent evaluation of petitioners' allegations, coupled with the compelling interests counseling against such interviews, justified the court's rulings.

1. In support of their first motion to interrogate jurors, petitioners filed an affidavit of Tanner's trial counsel (J.A. 246-248) that described a telephone conversation counsel had with one of the jurors concerning juror misconduct. In addition, petitioners filed two newspaper articles describing interviews with the same juror (*id.* at 139) and an affidavit of a private investigator hired by Tanner, who purportedly overheard a conversation between two jurors during the trial that suggested misconduct (*id.* at 177-180). At the hearing on the first motion, Tanner's counsel formally testified in support of the motion (*id.* at 169-171).

The allegations of juror misconduct accompanying the first motion were not compelling. The only possibly relevant allegation made in the affidavit filed by Tanner's counsel was that several of the male jurors drank alcohol at lunch during the trial and, as a result, "slept through the afternoons" (J.A. 247).[25] The private investigator's affidavit stated

[25] The other allegations purportedly made by the juror were that (1) " 'she did not believe the Defendants are guilty' "; (2) "she should have 'stood her ground' during the deliberations"; (3) one of the male jurors "intimidated her and some of the other jurors during deliberations, causing [the juror] to agree that the Defendants were guilty when she did not believe that they were"; and (4) some of the male jurors "didn't care about the trial or the Defendants." J.A. 247. Each of these allegations concerns inadmissible matters that "inhere in the [jury's] verdict" even under the most relaxed construction of Rule 606(b). See generally 3 *Weinstein's*

only that he had overheard one of the jurors asking two others where they were "going to drink [their] lunch" (*id.* at 179). Tanner's trial counsel stated at the hearing only that he saw several jurors sleeping and once noticed one of the jurors in a "giggly mood" (*id.* at 168, 171); he conceded that he had failed to call those matters to the court's attention at the time.

Even apart from Rule 606(b), these allegations fall short of requiring a hearing with testimony from the jurors. First, evidence that jurors consumed some alcohol during the trial does not provide a sufficient basis for overturning a jury verdict. See *United States* v. *Provenzano*, 620 F.2d at 997. Apart from the conclusory and speculative statement by Tanner's trial counsel that one juror "might well have been intoxicated," there is not even a bare allegation that the jurors drank an excessive amount of alcohol or that any one of the jurors was intoxicated. Indeed, one of the newspaper articles submitted by petitioners in support of their motion quoted the juror upon whom petitioners relied as denying that any juror had been intoxicated (J.A. 139).[26]

Moreover, the allegations that jurors had been sleeping were susceptible to independent evaluation by the trial judge without any juror testimony. For that reason as well, the court's denial of petitioners'

Evidence, supra, ¶ 606[04], at 606-28 to 606-29; ABA Project on Minimum Standards for Criminal Justice, *Standards Relating To Trial By Jury, supra*, at 172; Comment, *Impeachment of Jury Verdicts*, 25 U. Chi. L. Rev. 360, 362-364 (1958); see also *Hyde* v. *United States*, 225 U.S. at 384.

[26] The district court was also entitled to discount the testimony of Tanner's trial counsel because, as noted by the district court (J.A. 168), the court had previously advised counsel to bring any such matters to the court's attention during the trial, and counsel had not done so (*ibid.*; see *id.* at 147).

motion was not an abuse of discretion. In denying the motion, the trial judge pointed out that he ha[d] an unobstructed view of the * * * jury box" and that he "didn't see anybody sleeping" (*id.* at 147-149, 167-168). The trial judge also invited the parties to call to the witness stand any courtroom personnel or marshal who worked during the trial. The judge noted that in the past, courtroom employees with an opportunity to observe the jury had always reported to him any possible problems with the jury and that "[n]othing was brought to my attention in this case about anybody appearing to be intoxicated or being intoxicated' (*id.* at 171-172). Only after reiterating that he had "observed everything there was to observe" (*id.* at 173) and had seen "nothing to suggest" that any jurors were intoxicated (*id.* at 171-172), did the judge conclude that the motion to interview the jurors should be denied (*id.* at 173). In light of the judge's ability to evaluate petitioners' allegations based on his own observations, the denial of that motion was not an abuse of the district court's discretion.

2. Nor did the district court abuse its discretion in denying petitioners' second motion to interview the jurors. While the affidavit by Juror Hardy, which was filed in support of the second motion, contained more particular allegations of alcohol and drug use by the jurors, Juror Hardy conceded that none of the jurors with whom he drank at lunch had been drunk (Pet. App. 47). The only allegations in his affidavit concerning the effects of the drug and alcohol ingestion were his claim that his "reasoning ability" had been impaired on one day of the trial and that several of the other jurors were "falling asleep all the time during the trial" (*id.* at 46, 55). These conclusions, like those accompanying petitioners' first motion, were confined to jury conduct dur-

ing the trial and did not refer to the jury's deliberations.[27] Like the allegations in the first motion, they were subject to evaluation by the trial judge based on his first-hand observations of the jurors (and the absence of any contrary reports by courtroom personnel).[28]

The district court was entitled to disregard the allegations in support of petitioners' second new trial motion for a second reason as well: the Hardy affidavit that provided the basis for the second motion was obtained in direct violation of the court's prior order and of a local court rule. Upon denying petitioners' first motion to interrogate the jurors, the court specifically instructed petitioners, in accordance with the court's local rule (M.D. Fla. R. 2.04 (c)), not to interview any of the jurors without receiving the court's prior approval (J.A. 181-182). Petitioners violated that order and the local rule by obtaining the Hardy affidavit without first seeking or obtaining approval from the court.

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[27] The allegations in the affidavits filed by Tanner's counsel and Juror Hardy pertained exclusively to juror conduct during the trial. See J.A. 246-248; Pet. App. 23-56; see also J.A. 159. The only reference to jury deliberations is contained in an ambiguous affidavit filed by one of Tanner's employees, in which the employee claimed that Juror Hardy had stated that three male jurors had each had a pitcher of beer "within three hours of rendering a verdict in the case." See J.A. 244-245. Juror Hardy's affidavit does not confirm that account.

[28] That the drugs allegedly used by some jurors were illegal should not affect the analysis. See *United States* v. *Provenzano*, 620 F.2d at 997 ("[P]ublic knowledge that sitting jurors were smoking marijuana does not create such an appearance of impropriety as to warrant reversal of convictions where the jurors were not dismissed."). Presumably, petitioners' argument would be the same if the jurors had consumed prescription drugs that allegedly affected the jurors' attentiveness and ability to reason.

As described in the affidavits accompanying the second motion, Juror Hardy arrived unannounced at the home of Tanner's counsel, who invited him in. Tanner's counsel did not seek permission from the court to interview the juror either at that time or when he telephoned Juror Hardy two days later to ask him if he would agree to a transcribed interview. See Pet. App. 25-27; J.A. 241-242.

Because the interview with Juror Hardy was conducted in violation of the court's order and the local court rule, the district court was entitled to ignore the affidavit that resulted from that interview. Federal district courts throughout the country rely on local rules similar to the local rule upon which the district court relied in this case.[29] Courts and commentators, moreover, have uniformly recognized the importance of judicial control over access to jurors.[30]

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[29] See, *e.g.*, N.D. Ala. R. 10; S.D. Ala. R. 12; M.D. Ala. R. 9; D. Alaska R. 3(H); D. Ariz. R. 12; D. Ark. R. 25; D. Conn. R. 12(f); S.D. Fla. R. 16(e); S.D. Ga. R. IV(8); S.D. Ind. R. 35; D. Kan. R. 23A; E.D. Ken. R. 12(b); E.D. La. R. 14.5; M.D. La. R. 16(A)(5); W.D. La. R. 16; D. Md. R. 25A; S.D. & N.D. Miss. R. 1(b)(4); E.D. Mo. R. 16(D); D. N.J. R. 19B; M.D. N.C. R. 112(b); E.D. N.C. R. 6.03; S.D. Ohio R. 5.6; N.D. Okla. R. 8; W.D. Okla. R. 30(B)(5); E.D. Okla. R. 8; D. P.R. R. 322; D. R.I. R. 15(g); M.D. Tenn. R. 12(h); W.D. Tenn. R. 19; S.D. Tex. R. 2(f); W.D. Tex. R. 500-2; N.D. Tex. R. 8.2(e); E.D. Tex. R. 10; W.D. Wash. R. 47(b); N.D. W. Va. R. 1.19; S.D. W. Va. R. 3.02; E.D. Wis. R. 8.06; D. Wyo. R. 411.

[30] See *United States* v. *Davila*, 704 F.2d 749 (5th Cir. 1983); see also *United States* v. *Moten*, 582 F.2d 654, 665 (2d Cir. 1978) ("A serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have grievances against fellow jurors would be led into imagining sinister happenings which simply did not occur * * *. Thus, supervision is desirable not only to protect jurors from harassment but also to insure that the inquiry does not range beyond

Before interviewing Juror Hardy, petitioners should have sought judicial approval; if their request had been denied, they could have protested that denial to the court of appeals as part of their new trial claim.[31] In light of petitioners' disregard of the court's order and the local rule, it was not an abuse of discretion for the district court to deny the second motion for a new trial.

C. The Sixth Amendment Does Not Require An Evidentiary Hearing To Question Jurors About Allegations Of Juror Intoxication

Petitioners claim (Br. 30, 33-34) that the Sixth Amendment provides them with a constitutional right to an evidentiary hearing at which they can interrogate jurors about possible juror misconduct. In effect, they ask this Court to declare Fed. R. Evid. 606(b) unconstitutional to the extent that it precludes such a hearing. The Sixth Amendment, however, does not entitle petitioners to an evidentiary hearing of that kind.

While a defendant has a right to a mentally competent jury, that does not answer the question whether the defendant is constitutionally entitled to use any possible source of evidence to prove that a particular juror was mentally incompetent or impaired during the trial. Cf. 8 J. Wigmore, *Evidence*,

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subjects on which a juror would be permitted to testify under rule 606(b)."); see also ABA Project on Minimum Standards for Criminal Justice, *Standards Relating To Trial By Jury*, *supra*, at 165.

[31] The aggrieved party in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1983), after being denied permission to interview a juror, subsequently filed a second motion with additional information, which the district court granted with certain conditions. See *id.* at 550-551. The party did not, as Tanner's counsel did in this case, ignore the court's authority and interview the juror without judicial approval.

supra, ¶ 2253, at 697-698 ("The question, it is to be remembered, is not whether certain conduct constitutes a fatal irregularity or whether it can be proved at all, but whether a *juror alone* is to be forbidden to prove it.").

The Sixth Amendment does not require that a trial court allow the interrogation of jurors in response to every type of allegation of juror misconduct. Rather, the need for an evidentiary hearing turns on the nature of the allegation made in a particular case. When a colorable allegation is made that the juror was exposed to potentially prejudicial extrinsic influence, the Sixth Amendment normally requires that a trial court hold an evidentiary hearing to explore the matter. See *Smith* v. *Phillips*, 455 U.S. 209, 217-218 (1982); *id.* at 222 (O'Connor, J., concurring); *Remmer* v. *United States*, 347 U.S. 227, 230 (1954); see also *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983). The traditional presumption against post-verdict inquiry into jury deliberations is overcome in that circumstance by a presumption of prejudice to the defendant's right to an impartial jury. See *Remmer* v. *United States*, 347 U.S. at 229; *Sullivan* v *Fogg*, 613 F.2d 465, 467 (2d Cir. 1980); *United States* v. *Dioguardi*, 492 F.2d 70, 80 (2d Cir.), cert. denied, 419 U.S. 829 (1974). Claims of juror partiality due to extrinsic influence are usually susceptible to meaningful evaluation only through an evidentiary hearing. For those reasons, Rule 606(b) permits juror testimony to prove extrinsic influence in the form of "extrinsic prejudicial information" or "improper[] outside influence."

The Sixth Amendment, however, does not require the interrogation of jurors in a case such as this one, where the allegations of juror misconduct concern intrinsic influences bearing on juror attentive-

ness during the trial.[32] Because the inquiry into juror attentiveness involves considerations internal to the jury process, courts have required an especially strong showing of impairment prior to ordering any post-verdict inquiry. See, *e.g.*, *Government of Virgin Islands* v. *Nicholas*, 759 F.2d 1073, 1077-1081 (3d Cir. 1985); *United States* v. *Barshov*, 733 F.2d 842, 851 (11th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *Sullivan* v. *Fogg*, 613 F.2d at 467; *United States* v. *Dioguardi*, 492 F.2d at 80 ("[A]bsent • • • substantial if not wholly conclusive evidence of incompetency, courts have been unwilling to subject a juror to a hearing on his mental condition merely on the allegations and opinions of

[32] Petitioners' allegations of juror misconduct, while couched in terms of juror "competency," are more accurately characterized as claims of juror "inattentiveness" due to intoxication, a form of behavior particularly susceptible to judicial observation. Indeed, as described by petitioners in the district court, their Sixth Amendment claim in this case appears to be based on the proposition that the Constitution guarantees them the right to both an impartial and "attentive" jury. See, *e.g.*, J.A. 117 (Def. Motion for Interview of Jurors and Other Relief) ("It is simply impossible to secure a full and fair analysis of the evidence by an impartial and attentive jury."); *id.* at 127 (remarks of Conover's trial counsel at hearing on first motion) ("[I]t is more than sufficient to demonstrate that some jurors were drinking alcoholic beverages over the lunch hour during days when court was in session and that this had an effect on their ability to be attentive and to concentrate on the trial procedures."); see also *id.* at 152 (remarks of Tanner's counsel at hearing on first motion) (alcohol is an "outside source inasmuch as it precludes the effective hearing and attention to all the evidence in the trial"). Few jury trials would survive such a constitutional requirement of juror attentiveness. Cf. *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 555 (1984).

a losing party."). [33] Moreover, because a full-scale evidentiary hearing, including juror interrogation, is not indispensable to the court's evaluation of certain types of allegations of juror impairment, the Sixth Amendment does not mandate juror interrogation in those cases.

Unlike juror partiality, which tends to express itself only during jury deliberations and, hence, outside the presence of the trial judge, juror incompetence or inattentiveness is often reflected in juror behavior that is observable during the trial, either by the judge, by counsel, or by court personnel.[34] In addition, it is not unusual for other members of the jury to report to the court instances of a juror's incompetence, inattentiveness, or disruptive behavior before the trial ends. The trial judge can often evaluate the force of the allegations based on his own observations of the jury during the trial, and when the matter is reported during the trial, the judge can take steps to resolve it. See *United States* v. *Dioguardi*, 492 F.2d at 78, 81. Those measures, together with the jury screening process prior to trial, provide substantial protection against the risk that incompetent or seriously impaired jurors will be selected and remain on the jury.[35]

[33] The court in *Dioguardi* noted with approval the contrast between the courts' willingness to set aside jury verdicts "when there is proof of tampering or *external* influence" and the courts' reluctance to inquire into "possible *internal* abnormalities except 'in the gravest and most important cases.'" 492 F.2d at 79 n.12 (quoting *McDonald* v. *Pless*, 238 U.S. at 269).

[34] For example, in *United States* v. *Provenzano*, 620 F.2d at 996-997, the trial judge learned about possible juror misconduct (smoking marijuana) from the marshal during the trial.

[35] In addition, the requirement that the jury be unanimous in its verdict is designed in part to protect the parties in criminal cases against the risk that one or more jurors will

In this case, the court observed the jury throughout the trial and saw no reason to question any juror's competence or attentiveness. J.A. 148, 167-168, 173. One of the defense counsel claimed to have noticed jurors sleeping, but he failed to call the matter to the attention of the court at the time. Courtroom officers, including those charged with attending the jury during the lengthy trial proceedings, did not report any unusual conduct among the jurors. And, except for calling Tanner's counsel, petitioners declined the court's offer to call any nonjuror to testify in support of their allegations (J.A. 169-171). Under those circumstances, the district court did not violate petitioners' rights under the Sixth Amendment by refusing to permit the post-verdict interrogation of the jurors in this case.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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be inattentive at some points during the trial. The requirement of unanimity provides a margin of confidence in the accuracy of verdicts that makes even less compelling the need for close scrutiny of the jury's internal processes.

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